UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

In re Holocaust Victims Asset Litigation CV 06-983(ERK)(JO)

Application of Burt Neuborne

Memorandum of Law in Support of Lead Settlement Counsel's Application for an Award of Counsel Fees for Post-Settlement Services Provided to the Settlement-Classes

Lead Settlement Counsel submits this Memorandum of Law in support of an application for an award of counsel fees for post-settlement services to the settlement classes. The application covers the period from January 29, 1999-October 1, 2005, and is supported by the accompanying sworn declaration of Burt Neuborne, dated March 17, 2006, (hereafter the "Neuborne Declaration").

I, A Summary of the Fee Application[1]

Lead Settlement Counsel has moved pursuant to Rules 23(h)(1) and 54(d)(2) for an award of attorneys' fees for post-settlement services rendered to the settlement classes from January 29, 1999 (the date the settlement agreement was executed) through October 1, 2005. The application identifies a true market lodestar of $5,724,950 for 8,178.5 hours of service at Lead Settlement Counsel's current hourly billing rate of $700 per hour.

However, in view of the nature of this litigation, and in an effort expedite this process, Lead Settlement Counsel has voluntarily offered to discount his true market lodestar by approximately 25% (or more than 2,000 hours, approximating $1.635 million in fees), and seeks a discounted award of $4,088,500.

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[1] The precise nature of this fee application is set forth in the Neuborne Declaration at pp. 1-13; 25-26.

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In a further effort to expedite the process, Lead Settlement Counsel is prepared to waive compensation for 200 hours expended in August, 2004, in connection with the last round of Second Circuit appeals that were inadvertently overlooked in calculating the lodestar. The inadvertently omitted 200 hours are listed on p. 135 of Exhibit C to the Neuborne Declaration, and reflect time expended between August 3-23, 2004 in drafting and preparing Second Circuit briefs in the four related appeals in 04-1898(L).

If, despite the proffered discount of 25%, plus the proposed waiver of 200 inadvertently omitted compensable hours, the Court contemplates awarding a fee of less than $4,088,500, Lead Settlement Counsel seeks offsetting multipliers for excellence and for having augmented the value of the settlement fund by at least $50 million. Finally, to the extent the Court contemplates an award lower than $4,088,500, Lead Settlement Counsel reluctantly withdraws his offer to discount this application by 25%, and to forego the 200 inadvertently omitted hours, since it would be unfair to subject this fee application to two sets of discounts.

II. A Brief Summary of the Law Governing the Fee Application

A. The Settled Law Governing this Application

Under the common fund exception to the American rule on attorneys' fees, counsel who have played a significant role in conferring an economic benefit on a group (such as a class) are entitled to reasonable compensation from the group in an amount closely linked to the value of the benefit conferred. *Trustees v. Greenough*, 105 U.S. 527 (1881); *Central Railroad & Banking Co. v Pettus,* 113 U.S. 116 (1885); *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall v. Cole,* 412 U.S. 1 (1973); *Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980).

In this Circuit, a supervising District Judge may choose to compensate counsel in a common fund case by awarding a percentage of the economic benefit made available to the class, or by awarding a market lodestar fee. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2nd Cir. 2000); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*, 396 F.3d 96 (2nd Cir. 2005).[2] In this case, the District Court has opted for the lodestar approach, especially in the context of fees for services rendered after the achievement of the settlement in principle on August 12, 1998. *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 325 (EDNY 2002). See Transcript of Proceedings, Jan. 5, 2001 (set forth in the Neuborne Declaration, at pp. 96-97).

Under well settled principles in this Circuit, a lodestar fee is calculated by multiplying the attorney's market billing rate by the number of hours expended, in order to reach a market valuation of counsel's service to the class. The process is designed to replicate the result that would have been achieved through an arm's length bargain between counsel and the client class, were such a contractual arrangement feasible. *Farbotko v. Clinton County,* 433 F.3d 204, 208 (2nd Cir. 2005); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2nd Cir. 2000).

The lodestar market billing rate is determined by ascertaining the prevailing fees charged by lawyers of comparable expertise, experience and standing in the relevant market, which, in this case is New York City. *Farbotko v. Clinton County,* 433 F.3d 204, 208 (2nd Cir. 2005); *New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d

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[2] Prior to *Goldberger*, the leading Second Circuit common fund fee precedents were *City of Detroit v. Grinnell Corp.*, 495 F.2d 469 (2nd Cir. 1974)(*Grinnell* I), and *City of Detroit v. Grinnell Corp*, 560 F.2d 1093 (2nd Cir. 1977)(*Grinnell* II). See also *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974)(listing 12 factors in calculating lodestar). In none of the foundational lodestar cases did the cost structure of a lawyer play any role. As Justice Powell noted in *Blum v. Stenson,* 465 U.S. 886, 894, n. 10 (1984), prior to the enactment of fee-shifting statutes, market rates, not cost-plus, was the sole means of measuring non-statutory lodestar. When Congress embraced the market approach in *Blum*, it was merely codifying universally existing judicial practice in non-statutory settings.

1136, 1140 (2nd Cir. 1983)(quoting *Grinnell* II, 560 F.2d at 1098). See Neuborne Declaration, pp.111-113, and Exhibit H. Where, as here, payment of fees has been substantially deferred, counsel is authorized to apply current lodestar rates to past services in lieu of interest. *Le Blanc-Sternberg v. Fletcher,* 143 F.3d 748, 764 (2nd Cir. 1998).

The number of billable hours is determined by reference to the contemporaneous record of time expended by counsel in providing the services in question. In this Circuit, counsel must maintain a contemporaneous record of services rendered or suffer a discount for lack of billing records. See, eg., *Terminate Control Corp. v. Horowitz,* 28 F.3d 1335 (2nd Cir. 1994)(reducing base lodestar by 15% for failure to maintain contemporaneous time records).[3] In this case, however, excellent contemporaneous time records exist that have been cross checked against the computer records of the creation of the relevant documents. *See* Neuborne Declaration at pp. 1-78, and Exhibits A (list of tasks performed; B (chronological time line of activities); and C (detailed contemporaneous time records).

In this District and under the law of this case, a multiplier for excellence may be awarded to supplement a lodestar award . See *In re Holocaust Victim Assets Litig.,* 270 F. Supp.2d 313, 325-27 (EDNY 2002)(awarding Mr. Swift a 1.32 excellence multiplier in this litigation to supplement his lodestar and move it to $600 per hour); *In re "Agent Orange" Product Liability Litig.,* 611 F. Supp. 1296, 1329-30 (EDNY 1985) (awarding

[3] Thus, under the rules of the Circuit, if Lead Settlement Counsel had dispensed with contemporaneous records altogether, relying instead on reconstructed records, he would have been subjected to a 15% lodestar discount for lack of contemporaneous records, or far less than the 25% discount that he has already voluntarily offered.

three academic lawyers 1.5 excellence multipliers to offset 17% discount for low overhead), *aff'd* 818 F.2d 226 (2nd Cir. 1987).

Finally, the Supreme Court has recognized that time expended in litigating over fee awards is a deadweight loss to the courts and to society. Accordingly, the Court has warned against permitting lodestar disputes to blossom into a second full-scale litigation. *Hensley v. Eckerhart,* 461 U.S. 424, 437 and n. 12 (1983), especially where, as here, the motives of counsel in opposing this application are subject to serious question. See Neuborne Declaration, pp.79-88.

In the spirit of avoiding such a deadweight loss proceeding, Lead Settlement Counsel has offered to reduce his lodestar claim from true market lodestar of $5,724,950, to $4,088,500, or approximately 75% of true market lodestar, and to forego compensation in connection with 200 hours that were spent in defense of this Court's allocation rulings in August, 2004, but which were inadvertently overlooked in calculating lodestar. Such a voluntary discount would bring Lead Settlement Counsel's net hourly fee to $500 per hour for the 8,178.5 hours billed, fully $100 per hour less than the net hourly fee of $600 per hour awarded to Mr. Swift four years ago in these proceedings. *In re Holocaust Victim Assets Litig.,* 270 F. 3d 313, 325 (EDNY 2002).

Messrs. Dubbin and Swift, in the spirit of "payback," would like nothing better than to entangle Lead Settlement Counsel in an extended and wearying "gimlet-eyed" review of seven years of billing records. However, since a 25% discount has already been proffered, and since 200 clearly compensable hours have been inadvertently omitted from the calculation of the lodestar, such a deadweight loss proceeding is doubly inappropriate, both because it is a waste of the Court's time; and because such an adversary proceeding will inevitably result in the withdrawal of the offer of a voluntary 25% discount, the addition of 200 additional qualifying hours, and a request for a clearly justified award for excellence and augmentation of the fund, the combined impact of which will, at a minimum, simply take everyone back to the original request for $4,088,500, if not far higher.

B. The Claimed Legal Issues

1. Calculation of an Academic Lawyer's Lodestar

Despite the virtually universal practice of awarding academic lawyers their full market lodestar,[4] this Court has suggested that Lead Settlement Counsel, a Professor of Law, should have his market lodestar discounted to reflect the low overhead of an academic lawyer. The imposition of a "low overhead" discount on academic lawyers would be both unjustified and contrary to law because it would ignore the only basis on which common fund fees may be awarded – the economic value of the benefit to the client, a concept that has absolutely nothing to do with the cost structure of the lawyer who delivers the benefit. Moreover, to the extent that the common fund fee process is designed to replicate a constructive bargain between the class as a client and Lead Settlement Counsel, no well-informed client would agree to hire a lawyer on the basis of overhead and profit margin. Instead, a well-informed class would hire the lawyer most likely to achieve excellent results, regardless of that lawyer's profit margin. Given the principles underlying common fund awards, it would be inequitable to impose a medieval "just price" that allows the class to enjoy the economic benefits of excellent counsel,

[4] Lead Settlement Counsel has been unable to discover a reported case in the last 20 years in which an academic lawyer's lodestar has been reduced for low overhead. Nor, despite a wide acquaintance among academic lawyers, is Lead Settlement aware anecdotally of any case in which such an approach was attempted.

while refusing to pay the fee set by the collective judgment of the marketplace for such excellence. See *In re Continental Illinois Securities Litig.*, 962 F.2d 566, 568 (7th Cir. 1992)(Posner, J.,)("it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services on the market rather than being paid by court order").[5]

In any event, the issue of academic discount is mooted in this proceeding because Lead Settlement Counsel has already discounted fees by 25% from the true market lodestar of $5,724,950, to 75% of lodestar, or $4,088,500. Even if one applies the academic discount of 17% imposed by Judge Weinstein more than 20 years ago in *Agent Orange*, 611 F. Supp. at 1329-30 (immediately offset by a 1.5 excellence multiplier), to Lead Settlement Counsel's $5,724,950 true lodestar, Lead Settlement Counsel's requested fee of $4,088,500 would remain significantly lower than the fee resulting from Judge Weinstein's calculations in *Agent Orange*. Judge Weinstein's 17% academic discount would reduce the true market lodestar of $5,724,950 by $973,241 to $4,751,709, a result that is $663,000 greater than the $4,088,500 that is actually being sought.[6]

Moreover, if the Court is inclined to impose a low overhead discount on academic lawyers, the clearly justified offsetting enhancement for excellence would immediately restore the lodestar to the existing level, and perhaps higher. See 611 F. Supp. 1329-30 (award of 1.5 multiplier for excellence offsets 17% discount for low overhead leaving academic lawyers with a net lodestar 20% higher than non-academics).

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[5] The issue is discussed in more detail *infra* at pp. 23-28.

[6] Such a calculation ignores the additional $140,000 in fees attributable to the 200 inadvertently omitted hours in August, 2004 that Lead Serttlement Counsel is prepared to forego. Thus, even after Judge Weinstein's 17% academic discount, Lead Settlement Counsel's requested fee of $4,088,500 is $883,000 lower than Judge Weinstein's calculations in *Agent Orange*, without considering an excellence multiplier or an award for enhancing the value of the settlement fund..

The other three purported legal issues – a challenge to notice, an argument that Lead Settlement Counsel is estopped from seeking post-settlement fees because he had waived fees for helping to achieve the $1.25 billion settlement, and an argument that no fees may be awarded to Lead Settlement Counsel for defending the Court's allocation rulings on appeal – are wholly without merit.

2. Notice

Briefly, even if Rule 23(h) applies to a fee application by Lead Settlement Counsel in connection with work performed under the direction and supervision of the Court, and even if one assumes that the May, 10, 1999 notice is inapplicable, the combination of service on settlement counsel, as well as counsel for all known objectors and counsel for the State of Israel; posting on the case website; and massive newspaper publicity more than satisfies any conception of reasonable notice. Neuborne Declaration at pp. 88-90, and Exhibit I. See *Cobell v. Norton*, 2005 WL 3466712 (D.D.C. November 8, 2005)(posting on website and newspaper publicity sufficient notice under 23(h)). The Notice objection is discussed more fully *infra* at pp. 16-19.

3. Estoppel

Objectors' estoppel argument suffers from a fatal factual flaw, since Lead Settlement Counsel has never misled anyone concerning his intention to seek hourly lodestar fees for post-settlement work. In his statements to the Court and to the class, Lead Settlement Counsel has consistently distinguished between his *pro bono* pre-settlement work, and his post-settlement work. Neuborne Declaration, pp. 90-101. At no time has Lead Settlement Counsel represented that he was prepared to work for seven years without compensation. Indeed, six co-settlement counsel (Messrs. Weiss, Hausfeld, Ratner, Mendelsohn, Levin and Shevitz) have filed declarations attesting to their belief that Lead Settlement Counsel's willingness to work *pro bono* in achieving the settlement did not carry with it a promise to work for nothing for the next seven years. Neuborne Declaration, Exhibit G. Each co-settlement counsel, with the conspicuous exception of Mr. Swift whose motives are subject to serious question (Neuborne Declaration, pp. 81-85), asserts that he understood that Lead Settlement Counsel would receive appropriate compensation for serving in the arduous post of Lead Settlement Counsel.

As a legal matter, the estoppel argument collapses because neither the Court, nor co-settlement counsel, nor class members, nor the general public can be found to have reasonably relied to their detriment on any assertion of Lead Settlement Counsel concerning post-settlement fees. See *New Hampshire v. Maine*, 532 U.S. 742 (2001)(discussing elements of judicial estoppel); *Cleveland v. Policy Mgmt Systems Corp.*, 526 U.S. 795 (1999) (declining to apply judicial estoppel). The estoppel objection is discussed more fully *infra* at pp. 19-23, and in the Neuborne Declaration, pp. 90-101.

4. Fees for Defending the Court's Discretionary Allocation Decisions

Finally, objectors seek to draw an artificial distinction between representing the class as a whole in defending the results of the fair allocation process to which the class committed itself, and defending the allocation orders of the Court. The objection makes clear that objectors do not understand the role of Lead Settlement Counsel in enforcing the pre-commitment strategy adopted by the class at the fairness hearing. Neuborne Declaration at pp. 100-104. Even if such a distinction were to be made, the 200 hours during August, 2004 inadvertently omitted from the current lodestar application correspond exactly to the time spent in representing this Court's rulings on appeal.

II. A Brief Summary of the Facts Supporting the Fee Application[7]

On April 1, 1999, at the Court's urging, petitioner agreed to serve as court-designated Lead Settlement Counsel. In view of the demanding nature of the task, the Court has determined that Lead Settlement Counsel should be compensated at the conclusion of his service on a lodestar basis. Lead Settlement Counsel has now successfully completed the bulk of the legal tasks required to permit the implementation of the settlement agreement. As the accompanying declaration of Burt Neuborne demonstrates in detail, during the past seven years, Lead Settlement Counsel has expended more than 8,000 hours in providing necessary legal assistance to the settlement fund in connection with a kaleidoscopic array of issues.

A. Litigated Matters

Lead Settlement Counsel has appeared in twenty-nine formal legal proceedings in connection with the administration of the settlement agreement.[8] See *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2nd Cir 2000)(upholding limited definition of settlement classes); *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2nd Cir. 2001)(upholding Special Master's proposed allocation formula); *In re Holocaust Victim Assets Litig.*, 282 F.3d 103 (2nd Cir. 2002)(dismissing appeal from court-imposed self-identification requirement in connection with Slave Labor II releases; vacating and remanding on issue of after-acquired companies - issue resolved favorably by stipulation

7 The facts supporting this application are set forth in detail in the Neuborne Declaration, pp. 1-78

8 Each of the 29 formal legal proceedings is described in detail in the Neuborne Declaration at pp. 40-70.

on remand); *In re Holocaust Victim Assets Litig.*, (HSF), 424 F.3d 132 (2nd Cir 2005) (upholding Looted Assets class *cy pres* allocation formula; rejecting challenge to structure of settlement); *In re Holocaust Victim Assets Litig.*, (Dubbin), 424 F.3d 150 (2nd Cir. 2005) (upholding denial of attorneys fee to counsel for objector); *In re Holocaust Victim Assets Litig.*, (DRA), 424 F.3d 158 (2nd Cir. 2005) (upholding denial of *cy pres* payments to persons with no personal connection to Holocaust); and *In re Holocaust Victim Assets Litig.*, (Pink Triangle), 424 F.3d 170 (2nd Cir. 2005) (upholding denial of *cy pres* payments on group as opposed to individual basis). See also, *Matter of Swift*: *In re Holocaust Victim Assets Litig.*, (unnumbered - referred to panel in 04-1898. 424 F3d at 149, n. 14; *In re Holocaust Victim Assets Litig.*, (Ramsey Clark-Romani), 00-9593 (challenge to Looted Assets allocation formula)(withdrawn after full briefing); *In re Holocaust Victim Assets Litig.*, (Katz Estate), 04-9595 (challenge to cy pres administration of Looted Assets class)(withdrawn after full briefing); *In re Holocaust Victim Assets Litig.*, (Weiss), 00-9217 (challenge to fairness of settlement)(withdrawn after extensive motion practice and discussion); *In re Holocaust Victim Assets Litig.*, (HSF), 00-9614 (challenge to allocation plan)(withdrawn after discussions); *In re Holocaust Victim Assets Litig.*, (Wolf-Dunaevsky), 00-9103 (challenge to adequacy of representation)(withdrawn after motion practice); and *In re Holocaust Victim Assets Litig.*, (Bloshteyn), 00-9613, 14, (challenge to allocation formula (dismissed for non-prosecution after extensive discussions with appellants); *In re Holocaust Victim Assets Litig.*, (Schonbrun) (unnumbered)(challenge to fairness and allocation plan – withdrawn after in inquiry into client authorization); *In re Holocaust Victim Assets Litig.*, (Wolinsky)(unnumbered)(challenging notice given to disabled persons)(withdrawn); *In* *re Holocaust Victim Assets Litig.*, 256 F. Supp. 2d 313 (EDNY 2002)(directing banks to pay additional compound interest of $5 million on funds held in escrow account); *In re Holocaust Victim Assets Litig.*, 02-3314 (Block, J.)(motion to construe settlement agreement to exclude after-acquired companies from receiving slave labor II releases)(successfully resolved by stipulation permitting after-acquired companies to receive slave labor I, but not slave labor II, releases); *In re Holocaust Victim Assets Litig.*, (unnumbered)(Block, J.) (motion demanding access to additional information needed to administer the bank account claims process; and for leave to establish a NYC claims facility)(resolved successfully by negotiation after lodging motion papers with Court resulting in the June 10, 2004 Amendment 3 to the Settlement Agreement); *In re Holocaust Victim Assets Litig.*, 105 F. Supp.139 (EDNY 2000)(opinion upholding fairness of settlement under Rule 23(e)); *In re Holocaust Victim Assets Litig.*, 2000 U.S. Dist LEXIS 20817 (EDNY November 22, 2000)(opinion upholding allocation plan); *In re Holocaust Victim Assets Litig.*, 270 F. Supp 2d 313 (EDNY 2002)(opinion setting attorneys fees; denying risk multiplier); *In re Holocaust Victim Assets Litig.*, 2003 U.S. Dist. LEXIS 20686 (EDNY November 17, 2003)(opinion allocating supplemental distribution); *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89 (EDNY 2004), rehearing den., 311 F. Supp.2d 363 (EDNY) (rejecting objections to allocation of Looted Assets funds; rejecting fee application); *In re Holocaust Victim Assets Litig.*, 311 F. Supp.2d 407, reconsideration denied, 314 F. Supp. 155 (EDNY)(rejecting cy pres payments to gay and disabled communities); *In re Holocaust Victim Assets Litig.* (day-long fairness hearing held by the District Court on November 29, 1999); *In re Holocaust Victim Assets Litig.* (all-night telephone connection to fairness hearing held in Jerusalem on December 14, 1999); *In re Holocaust Victim Assets Litig.* (day-long hearing on November 20, 2000 on the Special Master's proposed plan of allocation); and *In re Holocaust Victim Assets Litig.* (day-long hearing on April 29, 2004 on the possible allocation of residual funds).

As the above-cited proceedings demonstrate, Lead Settlement Counsel has successfully briefed and argued seven plenary appeals to the Second Circuit from rulings of the District Court on aspects of the settlement; fully briefed and negotiated the dismissal of three additional Second Circuit appeals from orders of the District Court; and secured the dismissal of six additional appeals challenging aspects of the District Court's administration of the settlement after substantial motion practice and sustained negotiation.

In addition to successfully defending sixteen appeals to the Second Circuit, petitioner successfully litigated three plenary trial-level proceedings before Judge Block involving: (1) the payment of $5 million in compound interest on the settlement's escrow fund; (2) the eligibility of after-acquired Swiss companies for Slave Labor II releases; and (3) increased access to information needed to administer the Deposited Assets claims program.

Lead Settlement Counsel has also appeared in at least ten formal proceedings in the District Court involving aspects of the settlement's administration, including multiple hearings on the fairness of the settlement and the fairness of the plan of allocation and distribution.

B. Negotiated Matters[9]

In addition to representing the settlement fund in twenty-nine formal legal proceedings, Lead Settlement Counsel has engaged in three extensive rounds of negotiations with the defendant banks resulting in material amendments to the settlement agreement. The first round of negotiations in 2000 resulted in the adoption of Amendment 2 to the settlement agreement dealing with: (1) claims for the return of looted artwork; (2) access to information needed to administer the Deposited Assets claims program, including the publication of the names of 21,000 account holders; (3) acceleration of the payment of the settlement principal in order to generate $15-$20 million in additional interest income to fund the Deposited Assets claims program; and (4) the establishment of a modest insurance claims program.

The second round of negotiations in 2003 resulted in defendants' agreement that Swiss companies acquired after the end of WW II do not qualify for Slave Labor II releases.

The third round of negotiations in 2004-05 resulted in Amendment 3 to the settlement agreement: (1) authorizing a New York claims facility; (2) providing for the publication of 3,100 additional names of account holders; and (3) permitting CRT II access to the Total Accounts Data Base.

C. Congressional Proceedings[10]

In addition to the twenty-nine formal legal proceedings and the three rounds of negotiations, Lead Settlement Counsel petitioned Congress on the settlement's behalf on two occasions. Working closely with Mel Weiss, Lead Settlement Counsel successfully petitioned Congress in 2001to exempt from federal income tax all interest earned on the $1.25 billion settlement fund, as well as all payments received by beneficiaries. The federal income tax exemption provided a tax saving to the settlement fund of approximately $20 million, and increased the net value of every payment to a beneficiary by the beneficiary's marginal federal income tax rate.

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[9] The negotiations are described in detail in the Neuborne Declaration, pp.27-40.

[10] The Congressional lobbying efforts are described in the Neuborne Declaration at p 71.

The second approach to Congress involves an ongoing effort to secure reversal of the effects of the Supreme Court's unfortunate opinion in *Garamendi*. Lead Settlement Counsel is seeking to persuade Congress to authorize states to require the disclosure of Holocaust related claims information by any insurance company wishing to do business in the state.[11]

D. Structural Services[12]

Finally, Lead Settlement Counsel has played a major role in: (1) developing and implementing the settlement's bifurcated structure; (2) designing and executing, with the invaluable assistance of Morris Ratner, two notice programs; (3) assisting Special Master Gribetz in designing and structuring claims programs for the Slave Labor, Refugee and Deposited Assets classes; (4) assisting in designing a *cy pres* mechanism for the Looted Assets class; and (5) providing legal advice on a daily basis to class members and to the settlement's administrators at every stage of the process on issues ranging from federal income taxes to Swiss immigration law.

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[11] No fees are sought in connection with the effort to persuade Congress to reverse *Garamendi*, since the efforts have not yet been successful.

[12] See Neuborne Declaration, pp. 70-78.

IV. The Objections to This Fee Petition Are Without Merit

Objectors raise four sets of challenges to this fee application, none of which have merit. First, objectors argue that a mechanical reading of Rule 23(h) requires the class to waste $500,000 in additional notice costs in connection with this fee application. Second, objectors argue that Lead Settlement Counsel is: (a) estopped from seeking post-settlement fees because he waived his pre-settlement fees for having played a significant role in achieving the settlement; and (b) is ineligible for fees for defending the Court's allocation rulings in the Second Circuit. Third, objectors challenge the lodestar rate, arguing that Lead Settlement Counsel is not entitled to a $700 hourly rate because (a) he would fail to command such a rate in the New York legal market; and (b) as an academic lawyer, he must suffer a discount for low overhead. Finally, objectors challenge the accuracy and integrity of Lead Settlement Counsel's contemporaneous time records, raising both macro and micro objections in a futile effort call the integrity of the records into question. None of the objections has merit.

A. The Class Has Received "Reasonable" Notice of This Fee Application Within the Meaning of Rule 23(h)

As this Court has noted, the adversarial process may break down in the context of awards of attorneys' fees in common fund settings, especially in the context of settlement classes. *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 315, quoting *Goldberger*, 209 F.3d at 52). Once settlement has been achieved, a defendant has no interest in contesting plaintiff counsels' fee petition, and may well have promised not to oppose it under a "clear sailing" agreement. Moreover, since the pre-settlement legal work at issue will usually have taken place out of the presence and without the knowledge of the supervising District Judge, the Court is often not in a position to gauge the work's necessity and quality. Finally, the named-plaintiffs often lack the knowledge and resources to question such fee petitions.

In order to provide a check on such potentially improper fee applications, the Federal Rules were amended in 2003 to require, pursuant to Rule 23(h)(1), that fee awards to "class counsel" be handled by a formal motion under Rules 54(d)(2), and 52(a), with service of the motion on all parties, and "reasonable" notice directed to the class.

Mr. Swift argues that Rule 23(h)(1) mandates that a mass mailing be directed to the class at the cost of $500,000, notifying class members that Lead Settlement Counsel has applied for lodestar fees in connection with seven years of successful post-settlement service to the settlement classes. The argument, which can hardly be viewed as in the classes' true interests, breaks down on multiple levels.

First, Rule 23(h)(1) is designed to cover applications for attorneys' fees by "class counsel" in connection with pre-settlement work carried out beyond the supervising District Court's knowledge in settings where adversary opposition to the application is unlikely. By its literal terms, 23(h)(1) does not apply to lodestar fee applications by a "settlement counsel" (as opposed to a "class counsel") for post-settlement work carried out at the direction, and under the supervision, of the District Court itself. In such a setting, the supervising District Judge is in an excellent position to review the necessity and quality of the post-settlement services in question. Since re-notice to the class imposes significant monetary costs on the class (in this case $500,000), it would be absurd to read the term "class counsel" in 23(h)(1) as meaning "settlement counsel" in order to require an expensive re-notice to the class to protect the class against the supervising District Judge.

Second, the class has already received massive notice of the potential for attorneys' fees for both pre-settlement work by "class counsel" and post-settlement work by "settlement counsel". On May 10, 1999, massive notice to the class was effected, costing approximately $40 million, in connection with which the class was informed:

> The court appointed attorneys as Settlement Class Counsel...You do not have to personally pay the Court appointed attorneys. Certain attorneys will apply to the Court for reimbursement of costs, up to about .2% of the Fund. Certain Plaintiffs' attorneys will also apply for fees, up to at most 1.8% of the Fund [$22.5 million]. The Court may award a lower amount. Most attorneys will not apply for fees, and counsel for WJRO will not apply for fees or costs.

Accordingly, the class has been carefully notified that fees of up to $22.5 million may be payable to plaintiff's attorneys and settlement counsel. Thus far, the total of all fees awarded is approximately $7 million. If this discounted application for $4,088,500 is granted, the total fees awarded will still rest at less than 50% of the sum presented to the class in the initial massive notice proceeding. Costly re-notice would, therefore, be an irresponsible waste of $500,000 of the classes' assets. See *Teamsters Local v. Bombardier, Inc.*, 2005 WL 1322721 (SDNY 2005)(republication of notice disfavored); *Greenberg v. Bear Stearns*, 80 F. Supp.2d 65, 67 (EDNY 2000)(rejecting re-notice).

Finally, "reasonable" notice within the meaning of 23(h)(1) has unquestionably been directed to the class within the meaning of Rule 23(h)(1). See Neuborne Declaration., pp.88-90. The application has been served on all parties, including all settlement counsel. Copies have been made available to counsel for all known objectors. Copies have also been provided to lawyers for the State of Israel, the entity with the strongest claim to any potential residual funds. The entire application including objections, has been posted on the website maintained by the class. Finally, the application has received massive coverage in the press, especially the Jewish press, as a result of efforts by Mr. Swift and Mr. Dubbin to publicize this dispute over fees. See Neuborne Declaration, Exhibit I, setting forth news stories, as of February 17, 2006, in the New York Times, the Forward, Jewish Life, Haaretz, Jewish World, the Wall Street Journal, Jewish Week, Zimbabwe Sunday News, News 24 (South Africa), the Jerusalem Post, Newsday, the Associated Press, y.net Jewish Scene, NY1 News, Combined Jewish Philanthropies News, North Jersey.com, WNBC.com, ABC Action News (Philadelphia). Far from requiring costly re-notice, this may well already be the best noticed fee dispute in history.

B. Lead Settlement Counsel is Not Estopped From Seeking Post-Settlement Fees because He Elected to Waive Fees for His Pre-Settlement Activities

Objectors argue that having publicly waived fees for his role in achieving this $1.25 billion settlement, and having cited that waiver in numerous communications with the Court in settings where the waiver was relevant to the implementation of the settlement,[13] Lead Settlement Counsel is estopped from seeking lodestar fees for the more than 8,000 hours he has expended in providing post-settlement legal services to the settlement classes at the request of the District Court. The estoppel argument is both factually and legally hopeless.

[13] Lead Settlement Counsel has alluded to his waiver of pre-settlement fees in two settings: (1) where, in order to avoid problems under *Amchem*, it was necessary to establish that he had no economic stake in the approval of the settlement, or in any particular allocation of the proceeds; and (2) where the existence of *pro bono* pre-settlement counsel was relevant to the calculation of fees to other pre-settlement counsel. Each time, he has been careful to note that the waiver of fees covered his pre-settlement activities in helping to achieve the settlement. See Neuborne Declaration, pp 99-101.

As a factual matter, Lead Settlement Counsel never represented to the Court, or to the class, that his waiver of pre-settlement fees carried with it a promise to work an additional seven years without fee. See Neuborne declaration, pp. 90-101. In fact, a bright-line distinction exists between Lead Settlement Counsel's waiver of his pre-settlement fees, and the Court's decision, more than five month's later, to ask him to return and undertake the arduous task of Lead Settlement Counsel. Since a demonstration that Lead Settlement Counsel lacked an economic stake in the approval of the settlement, or in any particular allocation of the settlement proceeds, was crucial to the implementation of the pre-commitment strategy adopted by the class, it was necessary for Lead Settlement Counsel to place on the record in numerous communications with the Court that Lead Settlement Counsel had waived fees for helping to achieve the settlement. On each occasion, the reference to waiver of fees was carefully circumscribed to cover pre-settlement work.

Moreover, both the Court and six co-settlement counsel have made it clear that they understood that Lead Settlement Counsel was not waiving fees for post-settlement work. Neuborne Declaration, Exhibit I; Transcript of Proceedings, January 5, 2001. Indeed, the District Court recalls explicitly authorizing Lead Settlement Counsel to seek lodestar fees for post-settlement work in 2000, and Lead Settlement Counsel explicitly notified the German fee arbitrators and the general public that he was seeking hourly compensation for post settlement work. Neuborne Declaration, pp. 95-99. Thus, the one essential aspect of any invocation of estoppel – the existence of a false statement that induces detrimental reliance – is completely absent from this case.

In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the Supreme Court set forth the elements of judicial estoppel. In 1977, in order to induce the Supreme Court to accept a consent decree ending a boundary dispute with Maine, New Hampshire had represented to the Supreme Court that its boundary with Maine ran through the middle of Piscataqua River. The Court acted on the representation and entered consent decree terminating the dispute in a manner advantageous to New Hampshire. In 2001, New Hampshire sought to repudiate its earlier representation in connection with an original proceeding in the Supreme Court challenging Maine's jurisdiction over portions of Portsmouth harbor. The Court ruled that having induced the Supreme Court to enter a consent decree in 1977 in accordance with its representation, New Hampshire was judicially estopped from changing course in a new proceeding.

Justice Ginsburg noted that three elements are typically necessary for an invocation of judicial estoppel, none of which is present in this case. First, a party's later position must be "clearly inconsistent" with its earlier position. 532 U.S. at 750. As the Neuborne Declaration, the recollection of six-co-settlement counsel, and the Court's recollection demonstrate conclusively, there simply is no inconsistency between waiving fees for helping to achieve a settlement, and seeking lodestar fees with the approbation and knowledge of the Court and co-settlement counsel for post-settlement work as Lead Settlement Counsel for seven years.

Second, noted Justice Ginsburg, courts regularly inquire whether a party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position later would create the perception that either the first court or the second court was misled. 532 U.S. at 750. In this case, no court was persuaded to do anything. Lead Settlement Counsel's decision to waive fees for achieving the settlement did not require Court permission. Lead Settlement Counsel's decision to accept the Court's request to serve as Lead Settlement Counsel was not an effort to persuade a court to do anything. Quite the contrary – it was the Court that persuaded Lead Settlement Counsel. Moreover, the Court's recognition in 2000 that lodestar fees for Lead Settlement Counsel's work was appropriate was in no way a change in the Court's position. It was merely the Court's recognition that circumstances justified such a fee. Finally, no reasonable person viewing these events could believe that a court was "misled" at any point in the proceedings.

Finally, Justice Ginsburg noted that courts ask whether the party seeking to assert an inconsistent position (there is no inconsistency in this case) would derive an unfair advantage, or impose an unfair detriment on the opposing party if not estopped. 532 U.S. at 751. It is impossible to find an unfair advantage in allowing Lead Settlement Counsel to seek reasonable compensation for seven years of devoted and remarkably successful service to the settlement classes. Moreover, detrimental reliance on an inconsistent statement is wholly lacking. Judge Korman asserts that he did not detrimentally rely. The six co-settlement counsel assert that they did not detrimentally rely. Even Mr. Swift and Mr. Dubbin, although they assert surprise and disappointment, make no effort to show how they detrimentally relied on any statement of Lead Settlement Counsel.

Instead of seeking to show that the Court was misled, or that class members reasonably relied to their detriment on a false statement by Lead Settlement Counsel, Messrs. Swift and Dubbin, together with a few of Mr. Dubbin's South Florida clients, assert that they are surprised and disappointed that Lead Settlement Counsel is seeking a fee for seven years of intensive post-settlement work because they believed, unreasonably, that he intended to continue to work without fee indefinitely, despite the contrary discussion in open court. There is, however, no such thing as a doctrine of "estoppel by disappointment."

Moreover, with respect, the opposition by Mr. Dubbin's clients to the payment of a fee to Lead Settlement Counsel appears to be motivated by anger that he defended the Court's allocation decisions against charges by Mr. Dubbin that needy survivors in South Florida were being treated unfairly. When Mr. Dubbin's fees were at stake, the objectors vigorously supported him, even though the fee application was unjustified, presumably because they agreed with his substantive position. See Neuborne Declaration, pp 79-81; 85-88.

Thus, lacking the three basic elements of judicial estoppel set forth by Justice Ginsburg: (1) a clearly inconsistent statement to a past court; (2) action by that court in reliance on the inconsistent statement; and (3) the derivation of an unfair advantage through the assertion of an inconsistent position, the effort by Messrs. Dubbin and Swift to seek revenge against Lead Settlement Counsel because he blocked them from profiteering at the class's expense must fail. See Neuborne Declaration, pp. 79-88.[14]

C. Lead Settlement Counsel's Lodestar Rate is Fully Justified

Objectors challenge the use of a $700 hourly lodestar rate by Lead Settlement Counsel on two grounds. First, they argue that it does not reflect the rate which Lead

[14] Any attempt to switch to a theory of equitable estoppel would fail, as well, since detrimental reliance on a false statement is the essence of equitable estoppel. In this case, there is neither a false statement, nor any detrimental reliance.

Settlement Counsel would actually command in the New York legal market. Second, they insist that the rate be discounted to reflect the low overhead of an academic lawyer.

The first objection is completely rebutted by four declarations of knowledgeable attorneys, set forth as Exhibit H to the Neuborne Declaration, attesting to the fact that lawyers of Lead Settlement Counsel's expertise, experience and standing in the New York legal market routinely command at least $700 per hour in connection with the type of complex and innovative work that was necessary to assure the implementation of the settlement. In addition, Exhibit H contains the declaration of Nancy Rapoport, the Dean of the University of Houston Law School, and an expert in bankruptcy and legal ethics. Dean Rapoport confirms that a lawyer of Mr. Neuborne's skill and experience would routinely command $700 per hour in bankruptcy courts, and that there is no known practice of an academic discount or any other discounting for overhead of lawyers. This is of particular significance because bankruptcy courts are the largest source of non-contractual appointment of counsel in complex litigation, mirroring the concerns in class action appointments.

The bottom line is that Lead Settlement Counsel's efforts have played a major role in the successful distribution of $800 million to 300,000 persons, while actually augmenting the settlement fund by $50 million as a result of his actions. Neuborne Declaration, pp. 22-24; 106-111. Such remarkably successful representation clearly justifies a market rate reflecting a high degree of expertise and experience. Moreover, Lead Settlement Counsel has noted that he is currently serving as counsel in three matters in which he is billing $700 per hour, and that he has maintained a successful consulting practice for thirty years in connection with which he has routinely charged the prevailing market rate for a lawyer of his expertise and ability to a long line of blue chip clients. Neuborne Declaration, pp. 111-113. Accordingly, under the clearly established law of this Circuit, the $700 hourly lodestar rate must be applied by this Court. *Farbotko v. Clinton County,* 433 F.3d 204, 208 (2nd Cir. 2005); *New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1140 (2nd Cir. 1983)(quoting *Grinnell* II, 560 F.2d at 1098).

The second objection is equally unavailing. While it is incorrect to assert that academic lawyers have no overhead costs, their overhead costs are lower than those of a large firm. Objector's insistence that market lodestar rates be discounted to reflect the lower overhead simply cannot be squared with the prevailing theory under which common fund fees are awarded.

Under the American rule on attorneys' fees, each side ordinarily bears its own counsel fees. One exception to the American rule has been created by literally hundreds of congressional statutes providing for fee shifting in designated settings ranging from civil rights, to constitutional litigation, to Title VII to anti-trust to patent law. All agree that in a statutory fee-shifting case, a Court must utilize market rates in setting the lodestar without any deduction for low overhead costs. *Blum v. Stenson*, 465 U.S. 886 (1984). Indeed, in the hundreds of examples of Congressional fee shifting, counsel is unaware of any statute authorizing anything but market rates in calculating a lodestar fee.

The second major exception to the American rule occurs in common fund cases, where, as a matter of avoiding unjust enrichment, an attorney who has bestowed an economic benefit on a class must receive compensation from the common fund in an amount closely linked to the value of the economic benefit conferred. *Trustees v.*

Greenough, 105 U.S. 527 (1881); *Central Railroad & Banking Co. v Pettus,* 113 U.S. 116 (1885); *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall v. Cole,* 412 U.S. 1 (1973); *Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980).

The theory underlying common fund fees is avoidance of unjust enrichment by the benefited group by requiring payment of a fee keyed to the value of the economic benefit received. The cost structure of the lawyer providing the benefit is utterly irrelevant to the value of the benefit conferred upon the class. Not surprisingly, therefore, in the years prior to the enactment of fee shifting statutes, the Supreme Court reports that all courts used market rates, not cost plus, in assessing lodestar rates in non-statutory cases. 465 U.S. at 894, n.10. Not surprisingly, therefore, in the past 20 years, counsel has been unable to locate a reported instance of a court seeking to use cost plus in assessing lodestar fees in a non-statutory common fund case.[15]

Put another way, the function of a supervising judge in a common fund case is to replicate the constructive bargain that would have been struck by a knowledgeable class and the class's lawyer over fees. If a knowledgeable class were asked to choose between a mediocre lawyer with a high overhead, and an excellent lawyer with a low overhead, it is inconceivable that the class would allow cost structure or profit margin to play a role in its decision to hire the excellent lawyer at full market rates. In this case, for example, an academic lawyer with a low cost structure has delivered brilliant legal services to a class resulting in an augmentation of the fund by $50 million, and the successful implementation of a settlement resulting in the distribution, to date, of $800,000 to

[15] One reason for the dearth of authority is the decline of the use of lodestar in common fund cases, in favor of a percentage of recovery approach that better captures the unjust enrichment underpinnings of the common fund theory.

300,000 persons. It is inconceivable that the class would have spurned his services because his cost structure enabled him to earn a higher return on his efforts. Instead, the class would have asked itself whether the payment of market rates would be justified by the creation of a sufficiently valuable set of economic benefits for the class. Thus, apart from some sense of medieval just price, a lawyer's cost structure should have absolutely nothing to do with the setting of a common fund fee based on the value of the economic benefits conferred on the class.

Finally, the imposition of a downward departure from market rates depending on the cost structure of the particular lawyer, the issue squarely addressed in *Blum,* would have unfortunate consequences, aside from over-rewarding inefficient lawyers with overblown decorating tastes and large stables of associates. First, it would produce a windfall to the class based on the cost savings of the lawyer in question, without regard to the economic value of the benefit obtained by the class. Such a windfall cannot be squared with the theory of unjust enrichment that underlies the award of fees in common fund cases, a theory that looks solely to the economic value of the benefit conferred upon the class.

Second, it would discourage lawyers with low cost structures from accepting public regarding cases, as opposed to purely contractual relationships representing well-heeled clients where no question of a discount arises. Under a cost-discounted approach that departs from the market, lower cost-structure lawyers (such as academic lawyers) would have an incentive to consult on behalf of private clients who would pay market rates, rather than engaging in more public-centered litigation where they would be penalized for a low cost structure by a supervising court.

It is true, of course, that in 1985, Judge Weinstein, in what may be a unique exercise of authority, imposed a 17% discount on the academic lawyers in the *Agent Orange* settlement. *In re "Agent Orange" Product Liability Litig.*, 611 F. Supp.2d 1296, 1329-30. (EDNY 1985), *aff'd on other grounds*, 818 F2d. 226 (2nd Cir. 1987). However, the 17% discount was immediately linked to a 1.5 excellence multiplier that actually increased the net lodestar of the three academics to 20% above the lodestar payable to partners in firms with significant overheads.

While Judge Weinstein's effort to displace the market lodestar is without support either previously or subsequently, even under the *Agent Orange* precedent the requested award in this case is fully justified. Judge Weinstein's formula in this case would apply a 17% discount from his full lodestar of $5,731,900, or approximately $975,000, followed by the addition of the 1.32 excellence multiplier awarded to Mr. Swift earlier, leaving Lead Settlement Counsel in a significantly better position than the $4,088,500 initially sought. Rather than indulge in such mathematical juggling, however, involving the use of excellence multipliers, augmentation enhancers and withdrawn discounts, Lead Settlement Counsel earnestly urges the Court to recognize that the academic discount issue has been mooted by Lead Settlement Counsel's original offer of a 25% discount from lodestar.

D. No Basis Exists to Question the Accuracy or Integrity of Lead Settlement Counsel's Contemporaneous Time Records.

Objectors seek to entangle Lead Settlement Counsel in an extended "gimlet eyed" review of seven years of contemporaneous time records reflecting more than 8,000 hours of service. Pursuant to an agreement among counsel reflected in a series of emails submitted to the Court, the parties agreed that objectors would have until February 17, 2006 to pose challenges to Lead Settlement Counsel's contemporaneous billing records set forth in Exhibit C to the Neuborne Declaration. As of the close of the period, objectors had raised questions concerning a total of 170 hours of specific billing.

In compliance with the understanding among counsel, Lead Settlement Counsel made available information concerning his 2000 billings in connection with the German slave labor cases (627 hours), and the text of his representation to the German fee arbitrators in November 2000 that he would separately seek hourly lodestar fees for his service as Lead Settlement Counsel in this matter. In addition, Lead Settlement Counsel provided objectors with the January 5, 2001 transcript concerning fees at which the issue of hourly lodestar post-settlement fees for Lead Settlement Counsel was discussed. Finally, in response to queries by both Mr. Dubbin and Mr. Swift about specific time entries, Lead Settlement Counsel provided sworn detailed explanations of the entries. Neuborne Declaration, pp. 123-138.

For example, Mr. Swift questioned Lead Settlement Counsel's billings in 2000, hypothesizing that they reached 4,267 hours. Lead Settlement Counsel provided Mr. Swift with sworn refutations, explaining that the billings for 2000 were: 1808 hours for the Swiss case; 627 hours for the German slave labor cases; and not more than 150 hours on academic subjects because Lead Settlement Counsel was on academic leave for most of the year 2000, and on a reduced teaching schedule of three hours per week for one 14 week semester for the rest of the year. Neuborne Declaration, p 125. Thus, the billing total for 2000 is a predictable figure of approximately 2,500 hours, a modest number given the intense working environment during that year.

Similarly, Mr. Swift has sneeringly challenged billings on three weekends in 2003 and 2004 when the press of business was so great that Lead Settlement Counsel worked around the clock without sleep in an effort to fulfill his responsibilities. Neuborne Declaration pp. 134-138. Lead Settlement Counsel explained that when working in an uninterrupted bloc, time was charged to the day the work cycle began, resulting in anomalous charges of more than 24 hours with no effort to allocate the time to the next day. Lead Settlement Counsel fully described the contemporaneous records recording the lack of sleep. Unfortunately, the need to work long into the night in order to carry out the needed work occurred more often than three weekends in 2003 and 2004.

Mr. Swift's other challenges to the time charges border on the petty. He claims that Lead Settlement Counsel failed to delegate work. Lead Settlement Counsel has responded with a series of examples of delegation, and a reluctant public statement that that delegation to Mr. Swift was never an option because of Mr. Swift's poor performance in drafting the settlement agreement, his eccentric statements about Jews, his hostility to the claims-based nature of the settlement, and his personal attacks on Lead Settlement Counsel that the Court has branded as "frivolous and pointless." 270 Supp.2d at 125. Neuborne Declaration, pp. 81-85; 126-127.

Finally, Mr. Swift's claim that he was willing to work *pro bono* to implement the settlement is simply inaccurate. His actual representation to the Court in the context of his request for a 2.29 risk multiplier was that, if granted, he had no intention of seeking compensation for the "modest" hours incurred after November, 20 2000. 270 F. Supp.2d at 324. At no time did Mr. Swift offer to expend significant time implementing this settlement, *pro bono* or otherwise. In candor, if he had made such an offer, it would have been declined for the reasons set forth in the preceding paragraph.

Mr. Dubbin's petty quibbles with 70 hours of time billed out of more than 8,000 hours are, if possible, less worthy of serious scrutiny than are Mr. Swift's. Neuborne Declaration, pp. 129-134. The flavor of Mr. Dubbin's challenges can be understood by his misguided effort to cast doubt on Lead Settlement Counsel's integrity by preposterous claims about the date the Court was informed of the existence of the Holocaust Survivors Foundation (HSF), a hollow organization created by Mr. Dubbin to make it appear that he spoke for all American Holocaust survivors. Mr. Dubbin notes that on February 21, 2001, Lead Settlement Counsel billed 2 hours of time for work on the "HSF appeal." In an effort to cast doubt on Lead Settlement Counsel's integrity, Mr. Dubbin swears that the Court was unaware of HSF on February 21, 2001, implying that the time record was fabricated or back-dated. In fact, Mr. Dubbin was fully aware that HSF had described itself to Court and to Lead Settlement Counsel on November 16 and 20, 2000 (more than three months *prior* to the February 21, 2001 billing entry), in the form of letters and affidavits submitted by Mr. Dubbin's clients, Leo Rechter, David Mermelstein and Joe Sachs. Indeed, Mr. Dubbin cited those documents as recently as 2004 in an effort to defend HSF's standing.

Mr. Dubbin's remaining micro quibbles are fully explained in the Neuborne Declaration, at pp. 129-134. The most absurd is that no fees should be awarded for seeking additional information for the various claims processes because the information was not useful. Perhaps Mr. Dubbin should tell that to the class members who have received $300 million, to date, from the bank account class as a direct result of information gained through the efforts of Lead Settlement Counsel. Neuborne Declaration, pp 27-40. The most amazing quibble is that no fees should be awarded in connection with negotiating the insurance claims program because it is worthless, a claim directly contrary to Mr. Dubbin's prior assertions that the insurance program was worth between $50-$100 million in connection with his own inflated fee applications. In fact, the value of the insurance program is modest, but its real importance lay in removing the major obstacle to the acceptance of the $1.25 billion settlement as fair. Neuborne Declaration at pp. 33-34.

E. The Future Course of These Proceedings

Assuming that objectors comply with the Court's directive to file a consolidated summary of their objections to this application on or before March 17, 2006, the matter will be ripe for speedy resolution. The record closed by agreement of counsel on February 17, 2006, and only mediation of factual issues is left before the Magistrate Judge. The Court's request for omnibus consolidated objections is designed to simplify and expedite the process, not to re-open the record. Given the comprehensive narrative in the Neuborne Declaration, and its thorough refutation of every objection to this proceeding, Lead Settlement Counsel earnestly urges the Court to grant the discounted application which seeks 75% of lodestar because no justification exists to engage in a disfavored and socially useless satellite litigation. *See Blum v. Stenson,* 465 U.S. 891, 892, n5 (1984): *Hensley v. Erkerhart,* 461 U.S. at 437 and n. 12..

If , however, the objectors are successful in turning this proceeding into an extended satellite litigation involving a socially useless inquiry into seven years of contemporaneous billing records that have been sworn to, and verified by cross checking against the computer records of the documents produced, Lead Settlement Counsel will have no choice but to withdraw his effort to expedite the proceedings by proffering a 25% lodestar discount from his true market lodestar of $5,731,900, to a discounted fee of $4,088,500, a discount of approximately $1.65 million that is more than capacious enough to more than cover any quibbles over billing entries or low overhead. If, in fact, this proceeding is to unfold as an adversarial satellite litigation, Lead Settlement Counsel will have no choice but to seek his full market lodestar of $5,731,900, enhanced by an excellence multiplier, and a multiplier linked to the augmentation of the settlement fund by more than $50 million.

Conclusion

In view of the unique nature of this litigation, Lead Settlement Counsel has carefully considered whether to further discount his lodestar below the proffered 75%. For the following reasons, Lead Settlement Counsel has determined that a further discount is not appropriate. First, counsel has already respected the unique nature of this litigation by waiving a substantial claim for fees for having played a significant role from January, 1997-August 12, 1998 in achieving the settlement. Second, Lead Settlement Counsel's legal efforts on behalf of the settlement fund have resulted in an increase in the value of settlement fund that exceeds by many multiples the discounted lodestar fee sought by counsel. Lead Settlement Counsel's litigation efforts resulted in the payment of $5.2 million in additional compound interest payments on funds held in the settlement's escrow account. Lead Settlement Counsel's negotiation efforts resulted in the accelerated payment of the settlement principal, enabling the settlement fund to earn between $20-$25 million in additional interest. Lead Settlement Counsel's lobbying efforts, in conjunction with the efforts of Mel Weiss, resulted in the exemption from federal income taxation of all interest earned on the settlement principal, or distributed to class members, a benefit conservatively valued at $25 million to the settlement fund, and more than $50 million to individual members of the class. Furthermore, Lead Settlement Counsel's efforts resulted in the establishment of a modest insurance claims program with a theoretical value of up to $50 million, and a practical value of approximately one million dollars. In addition, Lead Settlement Counsel's efforts have imaginatively navigated this unprecedented settlement to a successful conclusion, resulting in the distribution of $800 million to more than 300,000 persons around the world. At a minimum, therefore, Lead Settlement Counsel's successful efforts have increased the settlement fund by far more than ten times the amount of counsel's requested lodestar fees, rendering a further discount inappropriate. Finally, the quality and intensity of Lead Settlement Counsel's efforts make a further discount particularly unwarranted. Lead Settlement Counsel has been successful in each of the multiple tasks described in the accompanying petition, but only after the expenditure of intensive effort. In fact, the challenging nature of the work and the quality and success of counsel's efforts warrant an excellence multiplier, not a discount. Comparison with the District and Circuit's most relevant precedent reveals that the discounted lodestar request in this case is already far below the prevailing rate for services of the nature and quality provided to the settlement by Lead Settlement Counsel.

In *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.* 396 F.3d 96 (2nd Cir. 2005), plaintiffs' counsel, after seven years of litigation in this District, achieved an antitrust settlement valued at $3.3 billion in compensatory payments. Plaintiffs' counsel in *Visa* sought fees of $609 million, approximately 18% of the compensatory recovery. The District Court, noting that plaintiff-counsels' lodestar was $62 million, declined to award a fee that multiplied lodestar by a factor of 9.5. Instead, Judge Gleeson awarded a fee of $220 million, or 6.5% of recovery, which he noted was approximately 3.5 times the lodestar. The Circuit affirmed.

In this case, Lead Settlement Counsel has, likewise, labored for approximately seven years in this District. The settlement fund being defended and administered is $1.25 billion, as opposed to the $3.3 billion in *Visa*. The discounted lodestar is approximately $4 million, as opposed to the $62 million in *Visa*. Lawyers in each case achieved a high level of success. Lead Settlement Counsel asks that his lodestar be *discounted* by approximately 25%. In *Visa*, counsel received a *multiplier* of 3.5 of lodestar. Since Lead Settlement Counsel's request for fees is already proportionately far lower than the award of fees in *Visa* it would be inappropriate to discount the fees further.

Acc ordingly, Lead Settlement Counsel respectfully requests a discounted attorney's fee award of $4,088,500. In the alternative, Lead Settlement Counsel seeks a true market lodestar award of $5,731,900, enhanced by an excellence multiplier of 1.5 and a multiplier for enhancement of the value of the settlement fund by more than $50 million.

Dated: March 17, 2005
New York, New York

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